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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

EARLINE COLE, as an individual and as)
personal representative of the ESTATE OF)
STEVEN BEARCRANE, CLETUS COLE, as)
an individual and as personal representative of) CV-09-21-BLG-RFC-CSO
the ESTATE OF STEVEN BEARCRANE,)
PRECIOUS BEARCRANE, minor child,) **MOTION TO DISMISS**
VERONICA SPRINGFIELD, as an individual) **DEFENDANT MARTY J.**
and as personal representative of the ESTATE) **JACKLEY OR, ALTERNA-**
OF ROBERT SPRINGFIELD, and VELMA) **TIVELY, MOTION TO**
SPRINGFIELD, minor child,) **SUBSTITUTE ACTING**
Plaintiffs,) **UNITED STATES**
v.) **ATTORNEY**
FEDERAL BUREAU OF INVESTIGA-)
TIONS, SALT LAKE CITY FIELD OFFICE,)
UNITED STATES ATTORNEYS OFFICE)
FOR SOUTH DAKOTA, MARTY J.)
JACKLEY, in his official capacity, ERNEST)
WEYAND, in his individual and official)
capacity, and MATTHEW ORAVEC, in his)
individual capacity,)
Defendants.)

The United States of America, by Lynn Jordheim, Acting United States Attorney for the District of North Dakota, and Shon Hastings, Assistant United States Attorney, acting on behalf of defendant, Marty J. Jackley (former USA Jackley), in his official capacity, move this Court for an Order dismissing former USA Jackley from the Amended Complaint or, alternatively, substituting Acting USA Dennis R. Holmes for former USA Jackley.

Former USA Jackley submitted his resignation as United States Attorney for the District of South Dakota with his last official day in this appointed position on September 3, 2009. Since plaintiffs are not suing Jackley in his personal capacity, and since he is no longer the United States Attorney for the District of South Dakota, he should be dismissed from this case, and reference to his name should be deleted. A lawsuit against a federal employee in his/her official capacity is a lawsuit against his/her employer -- the United States. Pascucci v. Sharn, 17 F.3d 395 (Table) (9th Cir. 1994) ("A suit against a federal officer or employee in his official capacity is a suit against the United States." (citing Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir.1985)); Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) ("A suit against a public employee in his or her official capacity is merely a suit against the public employer."). Likewise, a

lawsuit against the United States Attorney in his official capacity, is a lawsuit against the United States. Edelmann v. United States, No. 4:07CV00633, 2007 WL 4287825 at *2 (E.D.Ark. Dec. 6, 2007) (Assistant United States Attorneys and FBI agent sued in their official capacities means that the case ultimately is against the United States.) Similarly, a lawsuit against the United States Attorney's Office, an organizational unit of the United States Department of Justice, which is a Department of the United States, is a suit against the United States. Whether the employees, agencies, organizational units or departments are individually named or not, the suit is brought against the United States. Consequently, there is no purpose in independently naming USA Jackley in his official capacity, since plaintiffs have also named the United States Attorney's Office for the District of South Dakota. Former USA Jackley should be dismissed from this case.

In the alternative, the United States respectfully requests that Acting United States Attorney for the District of South Dakota, Dennis R. Holmes, be substituted for former USA Jackley, in his official capacity, as a party defendant to this case.

Therefore, the United States respectfully requests this Court to dismiss former USA Jackley from this case; or, in the alternative, substitute Dennis R.

Holmes, Acting United States Attorney for the District of South Dakota for former USA Jackley.

Dated this 9th day of October, 2009.

LYNN JORDHEIM
Acting United States Attorney

/s/ Shon Hastings

By: _____

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**CERTIFICATE OF SERVICE
L.R. 5.2(b)**

I hereby certify that on October 9, 2009, a copy of the foregoing document was served on the following persons by the following means:

1,2,3 CM/ECF
 Hand Delivery
 Mail
 Overnight Delivery Service
 Fax
 E-Mail

1. Clerk, United States District Court
2. Jean Bearcrane
Attorney for Plaintiffs
3. Patricia S. Bangert
Attorney for Plaintiffs

/s/ Shon Hastings

SHON HASTINGS, AUSA
Attorney for the Defendants:
Jackley, USAO-SD, FBI, and
FBI employees Oravec and Weyand